

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:NER:UNY:TL-N-4091-00

MIRoot

date: August 30, 2000

to: Chief, Quality Measurement Staff, Upstate New York District  
Attn: Richard W. Checci

from: Acting District Counsel, Buffalo

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subject: [REDACTED] Foreign Sales Corporation  
Interest netting pursuant to I.R.C. § 6621(d)

**DISCLOSURE STATEMENT**

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

**DISCUSSION**

This is in response to your request for our opinion concerning the above-captioned taxpayer. Generally, the issue involved is whether interest netting per I.R.C. § 6621(d) can apply between two different taxpayers.

Facts

████████ Foreign Sales Corporation ("████████ FSC" or "taxpayer") was incorporated ██████████. It is a wholly owned subsidiary of ██████████ ("████████"). Upon information and belief, ██████████ FSC meets the requirements to qualify as a Foreign Sales Corporation for purposes of I.R.C. §§ 921-927 and 291(a)(4).

████████ FSC filed a Claim For Refund And Request For Abatement (Form 843) seeking the abatement of interest in the amount of \$████████. The taxpayer claims it is entitled to interest netting between itself and ██████████.

The taxpayer's Form 843 states that the relevant period is ██████████ to the present. However, the attachment to the Form 843 provides that the relevant period is the taxpayer's taxable year ending ██████████ ("████████").

According to ██████████ FSC, it estimated its ██████████ tax liability to be \$████████. That amount was paid through ██████████ estimated tax payments.

████████ FSC was granted an extension until ██████████ to file its ██████████ return. When ██████████ FSC filed its ██████████ return it reflected a tax liability of \$████████. Accordingly, when it was granted an extension of time to file, it had underpaid its tax liability by \$████████. That underpayment was paid on ██████████ with the filing of the taxpayer's ██████████ corporate income tax return (Form 1120-FSC).

According to ██████████ FSC, its additional tax liability of \$████████ resulted from higher foreign sales corporation ("FSC") commission income than had originally been included by it and deducted by ██████████ for ██████████. Therefore, according to the taxpayer, ██████████ overpaid its ██████████ tax liability in an amount equal to ██████████ FSC underpayments.

The taxpayer reasons that since there have been equivalent underpayments and overpayments for the same period by ██████████ FSC and ██████████, it is entitled to the benefits of I.R.C. § 6621(d).

The taxpayer asserts that it exercised "ordinary business care and prudence." Therefore, the underpayment of tax resulting in increased interest due to the Internal Revenue Service, at issue in this case, was not due to willful neglect.

The taxpayer admits that [REDACTED] FSC and [REDACTED] are not the "same taxpayer". However, it argues they are "essentially the same taxpayer". That in substance, but not form a parent corporation and its FSC are the same taxpayer, because under the FSC rules, a parent can act on behalf of its FSC in many circumstances. Therefore, the parent and its FSC are essentially the same taxpayer and should be able to claim the benefits of the interest netting provisions.

#### Issue

Whether a corporation and its wholly owned subsidiary, which is a Foreign Sales Corporation (FSC), are entitled to the benefits of "interest netting" under I.R.C. § 6621(d)?

#### Analysis

Under I.R.C. § 6402(a), the Service can credit an overpayment as long as the person who made the overpayment is also liable for a tax against which the overpayment is to be credited. Generally, a member of a consolidated group is severally liable for the income tax liability of the group. Treas. Reg. § 1.1502-6(a). When a tax is jointly and severally owed by two or more taxpayers, the Service has the authority to collect the full amount of the unpaid tax from any of the liable taxpayers. Further, any interest attributable to the underpayment of the consolidated return tax liability will be computed subject to the provisions of I.R.C. § 6601(f).

I.R.C. § 6621(d) provides that to the extent interest is payable for any period under subchapter A and allowable under subchapter B on equivalent under payments and overpayments by the same taxpayer of tax imposed by the Code, the net rate of interest under Section 6621 on such amount shall be zero for such period.

Pursuant to I.R.C. § 1501, "an affiliated group of corporations shall, subject to the provisions of this chapter, have the privilege of making a consolidated return with respect to the income tax imposed by chapter 1 for the taxable year in lieu of separate returns..." I.R.C. § 1504(a) defines "affiliated group" as one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation..." I.R.C. § 1504(b) defines "includible corporation" as any corporation except a foreign corporation. I.R.C. § 1504(b)(3).

Since [REDACTED] FSC, is by statute, not a member of an "affiliated group", it is not a member of a consolidated group

for purposes of I.R.C. § 6402(a). As a result, the Service may not credit the overpayment of [REDACTED] to the liabilities of [REDACTED] FSC. Additionally, since these corporations are not the "same taxpayer", interest netting would not apply regardless of whether the under payments or overpayments were currently outstanding.

Given the lack of regulations, case law and Treasury Rulings on this issue, we are forwarding a copy of this opinion to our National Office for post-review. If, as a result of that post-review, there are any changes to our conclusions, we will apprise you of those changes.

If you have any questions regarding this matter, please contact Matthew I. Root of our office at 551-5610.

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Acting District Counsel